Filed 6/14/19 P. v. Foy CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRELL FOY,

Defendant and Appellant.

F074331

(Super. Ct. No. F15901580)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E. LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Appellant Tyrell Foy appeals his conviction for various sex offenses against his former girlfriend's children. He makes several contentions including that his convictions must be reversed because the trial court erred by discharging a juror in violation of Penal Code section 1089.[1] We agree and reverse. Because we reverse on this ground, we do not reach appellant's other contentions.

FACTUAL BACKGROUND

From approximately 2007 through August 2011, appellant was in a relationship with R.L. Appellant and R.L. moved in together shortly after she became pregnant with his child. Appellant and R.L.'s daughter, Aryanna, was born in July 2008. They lived with R.L.'s four other children: Robert, Louis, Isaiah, and K.L.[2]

Robert testified to four sexual incidents which occurred within a few days of one another two to three weeks before appellant moved out in 2011. Robert was around 10 or 11 years old. In two of the incidents, appellant tried to insert his penis into Robert's anus. He forced himself against Robert and touched Robert's anus with his penis, but his penis did not penetrate. During the second incident, appellant tried to insert his penis into Robert's mouth by holding Robert's head and pushing Robert toward him. Appellant's penis touched Robert's lips. In the third incident, appellant put his hands on Robert's waist and penetrated Robert's anus with his penis "a couple times." In the fourth incident, appellant inserted his hands into Robert's pants and touched Robert's penis.

Louis testified that on occasion appellant would have him, Isaiah, and Robert take showers with appellant. Appellant would do "weird stuff" and be "nasty" in the shower. Appellant would get behind the boys and do "wrong stuff." He saw appellant's penis

---

1 All statutory references are to the Penal Code.

2 We refer to some of R.L.'s children by their first names to protect their privacy. No disrespect is intended.

touch Isaiah "in the butt." On one occasion while they were in the shower, when Louis was approximately eight years old, appellant touched Louis "inside the part [he goes] to the bathroom with" "in his butt."

Isaiah testified appellant would have him take showers with K.L. and appellant. Isaiah was seven years old at the time. Isaiah said he never took showers with appellant and Louis or Robert. Isaiah said he saw appellant touch K.L. in the shower "in the behind." Isaiah said that on one occasion appellant tried to get behind Isaiah as close as eight inches away from him in order to touch him. Isaiah left the shower to try to get away from appellant because he did not want to be touched. Appellant told Isaiah to get back in the shower, and Isaiah did because he was afraid of appellant. Appellant did not try to touch Isaiah again.

The above incidents came to light starting in December 2014, when it was discovered by R.L. that Robert had committed lewd acts upon Aryanna and his younger cousin. R.L. confronted Robert about what she had heard, and Robert admitted that he had been inappropriate with Aryanna and his cousin. R.L. asked Robert why he did it, and he told her appellant used to molest him. R.L. told Robert she was going to handle it and get appellant put in prison. Later that day, Robert flagged down some police officers because he could not live with himself. He told them what he had done and was arrested. Robert did not tell the police at that time that anything of a sexual nature had happened to him. On December 9, 2014, Detective Federico assisted Detective Trueba in interviewing the other children in relation to a child protective services (CPS) case that had been initiated due to this incident. Upon completing those interviews, the detectives turned the children over to CPS and left. On December 10, 2014, Trueba and Federico interviewed Robert in relation to the case against him for the offense against Aryanna and his cousin, and Robert told them what had happened with appellant. R.L. was the first person to bring up appellant with the detectives.

In February 2015, Federico was officially assigned to the case involving the offenses appellant committed against Robert. That month, a CPS worker advised Federico that Louis and Isaiah had disclosed in therapy the incidents that had taken place with them involving appellant. On March 5, 2015, Louis and Isaiah gave statements to Federico in the presence of their therapist as to what appellant had done to them. Upon receiving these statements, the detective determined there was probable cause to arrest appellant. Appellant was arrested at the courthouse when appearing for dependency proceedings involving Aryanna.

Appellant testified in his own defense and denied that anything sexual ever happened with any of the children.

PROCEDURAL BACKGROUND

Appellant was convicted following a jury trial of three counts of a lewd act upon a child (§ 288, subd. (a); counts 1, 3, 4); one count of a forcible lewd act upon a child (§ 288, subd. (b)(1); count 2); and one count of aggravated sexual assault of a child—sodomy (§ 269, subd. (a)(3); count 6) against Robert. Appellant was convicted of one count each of an attempted lewd act upon a child (§§ 664/288, subd. (a); counts 7 & 8) against Louis and Isaiah. In a bifurcated bench trial on the alleged priors, the court found true appellant had suffered a prior strike conviction (§ 667, subds. (b)-(i)) and a prior serious felony (§ 667, subd. (a)(1)).

At appellant's sentencing, the court named count 6 as the principal count and sentenced him to 15 years to life, doubled to 30 years to life due to the strike prior, plus an additional five years for the serious felony enhancement. As to count 2, appellant was sentenced to the midterm of eight years, doubled to 16 years due to the strike prior. As to counts 1, 3, and 4, the court imposed consecutive terms of one-third the midterm of two years, doubled to four years each due to the strike prior. As to counts 7 and 8, the court imposed consecutive terms of one-third the midterm of one year doubled to two years each due to the strike prior. Appellant's total sentence was 35 years to life plus 32 years.

DISCUSSION

The Court's Removal of Juror 8

A. Relevant Background

The jury began deliberating on March 14, 2016, before lunch. On March 15, 2016, the jury asked for the overhead projector notes the prosecutor used in his closing argument regarding which count related to which child and for the transcript of Louis's testimony. In the afternoon of March 15, 2016, the jury submitted a note to the court that read: "Jury Update: [two] votes that are contradicting the majority have previous experiences causing the inability to change their vote. We would like [to] have guidance to move forward." Upon receiving this note, the court instructed all jurors to consider new perspectives. The jurors were excused for the day immediately following the instruction.

The following morning, March 16, 2016, the court went on the record outside the presence of the jury to disclose that two separate jurors, in two separate phone calls, had contacted the court clerk in reference to juror 8 after they were excused the day before. The court stated: "Apparently Juror Number 8 has disclosed during deliberations that he was investigated for molestation of his daughter…. He was asked directly both by the Court and I believe by both attorneys whether or not he or anyone in his family had been investigated for same or similar contact." The court indicated he was going to question juror 8, and if juror 8 did fail to disclose the accusation, the court's intention was to remove juror 8 and seat an alternate.

Juror 8 was brought in for questioning. The court told juror 8 that it had been informed that he had been accused of the same or similar type of conduct, which is the subject of the case. Juror 8 responded:

> "Yeah.It happened ten years ago.I was going through a divorce with my family, and it was a situation where I left the house, got my own apartment…. My daughter was three at the time….Kids would stay with

her for a week and then they would stay with me and my apartment for a week, back and forth, back and forth.

"Then I was contacted by the mother, my wife, saying that our daughter has come up with saying that you have guns in the apartment and we neither owned a gun.And that inappropriate things are happening.And I said that's not happening."

The court asked if "inappropriate things" meant sexual contact. Juror 8 responded that he was "not sure" because "nothing came of it," and he did not receive details. Juror 8 said his daughter went to counseling, and the counselor stated she needed to file a report with the police. Detectives went to juror 8's house and "looked around" and "that was it."

Juror 8 told the court he did not disclose the information during voir dire because it had been 10 years, he had put it out of his mind because nothing had come of it, he was not accused of anything, and nothing was filed. He told the court he had an open mind as to the allegations. Defense counsel asked juror 8 if he had specifically been asked if he had ever been accused. Juror 8 responded that he did not believe so. Defense counsel asked juror 8 if he had specifically been asked whether he had been a victim, and juror 8 responded that he did not consider himself or his daughter to be a victim. Juror 8 stated he listened to the other prospective jurors' disclosures regarding sexual abuse in their families but that he had no problems with the case. He stated his experience did not affect his outlook on being a juror on the case.

The court and counsel had an unreported conference in the hallway. The court then stated on the record: "[Juror 8], this is not in any way a situation where I am at all questioning your ability to be fair and impartial.What it boils down to is that information is something that both attorneys had a right to know during the selection process. So at this point I'm going to be excusing you from the jury. [¶] … Please don't interpret this in any way in empowering your ability to be fair. [¶] … [¶] … It is just that that information is something that they had the right to have before the selection process."

Upon juror 8's exit, defense counsel objected to a substitution and noted he did not think juror 8 was specifically asked whether he had been accused. The court responded that it did not have an independent recollection of whether juror 8 was specifically asked questions regarding the nature of the case. The court stated:

> "From [juror 8's] answers here in court this morning, I think it is entirely possible that he could have survived a challenge for cause, but I do believe that he was obligated to disclose either asked specifically those questions, or if asked if he had heard all the questions asked by the Court and counsel, and whether he would have had any positive responses, under either one of those venues, I believe he had an obligation to disclose what he disclosed here in court today. And both counsel, then, would have had an opportunity to evaluate whether that impact or whether they wished to exercise a peremptory, and both counsel had additional peremptories that they could have used for the jury. [¶] So for those reasons, the Court does believe that that information was inappropriately withheld during the voir dire process, and that is basis for seating the alternate."

The court seated an alternate on the jury and advised the jury it would need to begin its deliberations anew. The jury returned a guilty verdict on all counts that afternoon.

B. Analysis

Appellant contends the court violated section 1089 and his constitutional rights to due process and an impartial jury by removing juror 8. Because the record does not show a demonstrable reality that juror 8 was unable to perform his duty as a juror, we agree with appellant that the trial court erred under section 1089 in removing him from the jury. Because our conclusion is based on state law, we need not decide whether removal of juror 8 also violated appellant's constitutional rights. (See *People v. Wilson* (2008) 44 Cal.4th 758, 814; see also *People v. Brown* (2003) 31 Cal.4th 518, 534 [well-established rule requires the resolution of statutory claims before constitutional ones].)

Section 1089 reads in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror … upon … good cause shown to the court

is found to be *unable to perform his or her duty*, … the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

The trial court's decision whether to discharge a juror for good cause is reviewed under the abuse of discretion standard. (*People v. Hart* (1999) 20 Cal.4th 546, 596.) "Removing a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes. While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, fn. omitted.) Though a trial court's decision to discharge a sitting juror is reviewed for abuse of discretion, the trial court's factual basis for doing so is reviewed under the demonstrable reality standard. (*Ibid.*)

"The demonstrable reality test entails a more comprehensive and less deferential review [than the substantial evidence test]. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under [this] test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence *on which the court actually relied*. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality." (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1052–1053, third italics added.)

The trial court's finding that juror 8 concealed information during voir dire is not supported by a demonstrable reality. The jury pool was asked if they or a close friend or family member had been *arrested for* or *charged with* a similar offense or a complaining witness or victim *in a similar case*. A reasonable interpretation of these questions is that they refer to formal criminal proceedings. There is no evidence on the record that juror 8 was arrested for or charged with a similar offense, nor that his daughter was a complaining witness or victim in a criminal case. More notably, when questioned by the court, juror 8 stated he did not know whether his daughter's accusation was sexual in nature. The comments by the jurors who implicated juror 8 were made in unreported phone calls to the clerk, and the court did not independently question the jurors or investigate further to resolve this factual incongruity. Also, the court did not review the reporter's transcript to determine what specific questions were asked during voir dire.

Further, when alerted to facts that a juror possibly concealed material information during voir dire, the court must determine if such concealment or nondisclosure was intentional or unintentional. If the court determines the potential juror intentionally concealed material information, bias may be implied justifying his or her disqualification or removal. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 823.) On the other hand, " ' "[t]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find under … section[] 1089 … that he is unable to perform his duty." ' " (*Ibid.*)

That is all to say the cornerstone of the analysis is whether the juror is either impliedly or actually biased depending on whether the nondisclosure was intentional or unintentional. Here, the court made an express finding that juror 8 was able to be fair and impartial. The court noted "it is entirely possible that [juror 8] could have survived a challenge for cause." The court's sole reason for excusing juror 8 was that the information about the incident with his daughter was something the attorneys had "a right to know" during voir dire. This is not relevant as to whether juror 8 could perform his

duties as a juror. (See *In re Boyette* (2013) 56 Cal.4th 866, 889–890 [habeas corpus relief based on claim of juror nondisclosure during voir dire denied because the juror was not found to be biased, rejecting argument that counsel would have exercised a preemptory challenge].)

The court erred by discharging juror 8 because the record does not support by a demonstrable reality that good cause existed to find juror 8 was unable to perform his duty under section 1089.

DISPOSITION

We reverse the judgment and remand for a new trial.

_____
DE SANTOS, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
SMITH, J.